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Shari Millar 6174 Agee St. #81 San Diego, CA 92122			IMPINK, MOLLIE LLEWELLYN	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RALPH DALEY

Appeal 2019-005330
Application 15/019,105¹
Technology Center 3700

Before BIBHU R. MOHANTY, MICHAEL C. ASTORINO, and
KENNETH G. SCHOPFER, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), the Appellant appeals from the Examiner's decision rejecting claims 1–3 and 5–11. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

¹ The real part in interest is the inventor, Ralph Daley. Appeal Br. 2.

STATEMENT OF THE CASE

Claimed Subject Matter

Claim 1, the sole independent claim, is representative of the subject matter on appeal and reproduced below with some paragraphing added.

1. A serving tray comprising:

a planar member having a perimeter and for bearing products:

a wall extending substantially upwards from the perimeter of the planar member;

a handle extending outwards from a bottom surface of the planar member; and

a plurality of base support members positioned on the bottom surface of the planar member;

wherein the plurality of base support members are disposed precisely adjacent the perimeter of the planar member, with no radial space between the perimeter of the planar member and the plurality of base support members, and with the plurality of base support members not extending past the perimeter of the planar member;

wherein the bottom surface of the planar member has only the handle and the plurality of base support members thereon and no other structure; and

wherein the handle, the planar member, and the wall are molded together as one-piece.

Rejections

I. Claims 1–3, 5, 7, 8, and 11 are rejected under 35 U.S.C. § 103 as being unpatentable over Heyn (US 2006/0032780 A1, pub. Feb. 16, 2006) in view of Sussman (US 5,497,885, iss. Mar. 12, 1996).

II. Claim 6 is rejected under 35 U.S.C. § 103 as being unpatentable over Heyn, Sussman, and Burns (US 8,985,657 B1, iss. Mar. 24, 2015).

III. Claim 9 is rejected under 35 U.S.C. § 103 as being unpatentable over Heyn, Sussman, and Grieve (US 10,113,691 B2, iss. Oct. 30, 2018).

IV. Claim 10 is rejected under 35 U.S.C. § 103 as being unpatentable over Heyn, Sussman, and Gassick (US 7,975,623 B1, iss. July 12, 2011).

ANALYSIS

Rejection I

The Examiner finds Heyn's serving tray 20's planar member and peripheral edge portion 44 correspond to the planar member and wall, as required by independent claim 1. Final Act. 2. The Examiner finds that Heyn's serving tray 20 includes handle 22 and a plurality of base support members (i.e., feet) 50, 60, 62, 64.² *Id.* (citing Heyn, Figs. 1, 2, 5, 7).

The Examiner also finds Heyn's serving tray 20 fails to teach, "wherein the plurality of base support members are disposed precisely adjacent the perimeter of the planar member, with no radial space between the perimeter of the planar member and the plurality of base support members, and with the plurality of base support members not extending past the perimeter of the planar member," as recited in claim 1. *Id.* at 2–3. To

² The Examiner identifies Heyn's element numbers 50, 60, 52, and 64 as a plurality of base support members. Final Act. 2. Element number 52 refers to a loop portion of handle 22 and element numbers 50, 60, 62, and 64 are collectively described as a plurality of tubular cylindrical feet. *See* Heyn ¶¶ 26, 30–31. In light of foregoing, we understand the Examiner's citation to Heyn's loop portion 52 as a base support member, instead of foot 62, as a typographical error.

remedy this deficiency, the Examiner turns to the teachings of Sussman. *Id.* at 3 (citing Sussman, Figs. 2, 4 (legs 12)). The Examiner determines:

It would have been obvious to one of ordinary skill in the art . . . to reposition the legs (base support members) of Heyn to move them outwardly in order to improve stability such that they are positioned adjacent the perimeter of the planar member with no radial space between the perimeter of the planar member and the legs since it is well known that locating legs near the outer perimeter of an object increases stability.

Id.

The Appellant argues that the Examiner’s statement, “since it is well known that locating legs near the outer perimeter of an object increases stability” (*id.*), takes facts beyond the record. Appeal Br. 8. The Appellant’s argument is not persuasive of Examiner error.

The Examiner responds to the Appellant’s argument by explaining that:

Providing legs at the location of an outer perimeter of a serving tray is known as evidenced by Sussman. In the rejection of Heyn in view of Sussman, Examiner has taken into account the factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1 . . . (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. [§] 103. The factual inquiries include “Resolving the level of ordinary skill in the pertinent art.” [Manual of Patent Examining Procedure (MPEP) § 2141(II) (9th ed., rev. 8, Jan. 2018)]. Examiner relies on the well-known fact that a supported platform (here a tray) is more stable when the supports are at the perimeter edges of the platform.

Ans. 4. We agree with the Examiner’s response and adopt it as our own. *See KSR Int’l. Co. v. Teleflex, Inc.*, 550 U.S. 398, 421 (2007) (a “person of ordinary skill is also a person of ordinary creativity, not an automaton.”); *In re Sovish*, 769 F.2d 738, 743 (Fed. Cir. 1985) (one of ordinary skill in the art

is presumed to have skills apart from what the prior art references expressly disclose). Moreover, an artisan must be presumed to know something about the art apart from what the references disclose. *See In re Jacoby*, 309 F.2d 513, 516 (CCPA 1962). Further, we note that the Appellant does not argue “that locating legs near the outer perimeter of an object increases stability” is not well known.

Turning back to the Examiner’s rejection, and with regard to claim 1’s recitation, “wherein the handle, the planar member, and the wall are molded together as one-piece” (Appeal Br. 27 (Claims App’x)), the Examiner finds that Heyn’s planar member and wall 44 are molded as one piece. *See* Final Act. 3 (citing Heyn ¶¶ 26, 31, Fig. 5). The Examiner also finds that Heyn’s handle is not molded together with the serving tray’s planar member and wall. *See id.* The Examiner determines:

it would have been obvious to one of ordinary skill in the art . . . to modify Heyn to also have an integrally molded handle [A] in order to provide a tray with no assembly required and [B] further since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. *Howard v. Detroit Stove Works*, 150 U.S. 164 (1893).

Id. at 3–4. The foregoing determination includes a specific reason (i.e., “A”) for modifying Heyn’s handle to be molded with the serving tray’s planar member and wall 44 together as one-piece, namely, “in order to provide a tray with no assembly required.” *See* Ans. 5. The Examiner includes further supporting rationale (i.e., “B”) for reason “A” by citing to the holding in *Howard*.

The Appellant argues that Heyn and Sussman, individually or in combination, fail to “teach ‘the handle, the planar member, and the wall . . .

molded together as one-piece' . . . as required by . . . claim 1.”³ Appeal Br. 11. The Appellant supports this argument ostensibly by citing to Heyn at paragraphs 7, 28, and 30, which teach the Heyn's handle may be a flexible strap that is secured to the planar member's lower surface by use of mounting pedestals, screws, and the like. *See id.* at 11–12. The Appellant's argument is not persuasive of Examiner error.

At the outset, we note that the Examiner's determination does not rely on Sussman to teach the disputed feature of claim 1. Rather, as discussed above, the Examiner's reasoning is based on Heyn's teaching of molding components together as one-piece; specifically, serving tray's body 70 and wall 44, as well as feet 50, 60, 62, and 64. *See* Final Act. 3 (citing Heyn ¶¶ 26, 31, Fig. 5). Moreover, we do not need to look any further than reason “A,” *supra*, as providing adequate reasoning with rational underpinning for the Examiner's rejection. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (“[R]ejections on obviousness grounds . . . [require] some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”) (cited with approval in *KSR*, 550 U.S. at 418).

The Appellant argues that Heyn teaches away from the result of claim 1, “which is to mold the serving tray one-piece so that there are no screws, attaching fasteners, straps, bulky handles to provide the result of having no place for food to get stuck/trapped for sanitation purposes,” because the parts of Heyn are separate and distinct from each other and

³ The Appellant also addresses Burns as failing to teach a handle, planar member, and wall as being molded together as one-piece. *See* Appeal Br. 11, 13. However, the Examiner does not rely on Burns' teachings to reject the subject matter of claim 1, so the Appellant's discussion of Burns is not persuasive of Examiner error.

fastened together. Appeal Br. 14; *see id.* at 10, 13–15. For similar reasons, the Appellant argues that the proposed modification would result in Heyn being modified unsatisfactorily for its intended purpose and would change Heyn’s principle of operation. *Id.* at 15–17 (citing Heyn ¶¶ 7, 16, 21, 28, 30); *see also id.* at 9–10. The Appellant’s arguments are not persuasive of Examiner error.

At the outset, we note that the subject matter of claim 1 does not require molding the serving tray as one-piece; rather, claim 1 requires specific pieces of the serving tray as one piece. *See* Appeal Br. 27 (Claims App’x). Specifically, claim 1 recites “wherein the handle, the planar member, and the wall are molded together as one-piece,” which does not include the “plurality of base support members positioned on the bottom surface of the planar member” to be molded as one-piece with the handle, the planar member, and the wall. *See id.*

Although Heyn’s teachings include embodiments where the handle is secured to the planar member’s lower surface by use of mounting pedestals, screws, and the like, Heyn does not criticize, discredit, or otherwise discourage investigation into the use of the claimed invention. *See DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (“A reference does not teach away, however, if it merely expresses a general preference for an alternative invention but does not ‘criticize, discredit, or otherwise discourage’ investigation into the invention claimed.”) (quoting *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004)); *see also* Ans. 5–6. Stated otherwise, Heyn discloses various configurations of the handle and the planar member’s lower surface, but does not exclude any particular configuration. *See* Heyn ¶ 21.

Moreover, Heyn discloses that a skilled artisan would understand the various design considerations particular to serving trays. Heyn describes “[i]n serving tray designs, the use of various concepts have been adapted to assure that serving trays are nestable and stackable, and that they are *easily cleaned and disinfected*.” *Id.* ¶ 3 (emphasis added). So, even if modifying the configuration of Heyn’s handle and planar member’s lower surface in the manner proposed by the Examiner runs counter to some design aspects of an embodiment of Heyn’s serving tray, the change in design would constitute a typical tradeoff that would not have dissuaded one of ordinary skill in the art from exploring the benefits of modifying Heyn’s handle, planar member, and wall to be molded together as one-piece. *Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1165 (Fed. Cir. 2006) (citing *Winner Int’l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349 n.8 (Fed. Cir. 2000)) (“[O]bviousness must be determined in light of all the facts, and there is no rule that a single reference that teaches away will mandate a finding of nonobviousness. Likewise, a given course of action often has simultaneous advantages and disadvantages, and this does not necessarily obviate motivation to combine.”).

Further, the Appellant’s arguments that the proposed modification would result in Heyn being modified such that it is unsatisfactory for its intended purpose and would change Heyn’s principle of operation are not persuasive. After the proposed modification, the intended purpose and principle of operation of Heyn’s device are maintained because the device retains its functionality as a serving tray.

We have considered the remaining arguments advanced by the Appellant in the Appeal Brief at pages 9–11, 15–17, and 26, and the Reply

Brief at pages 1–3, and have determined that they are not persuasive of Examiner error.

Thus, we sustain the Examiner’s rejection of independent claim 1. The Appellant provides a separate heading but not a separate argument for the rejection of dependent claims 2, 3, 5, 7, 8, and 11. *See* Appeal Br. 18. Therefore, claims 2, 3, 5, 7, 8, and 11 fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Rejection II

The Appellant provides a separate heading but not a separate argument for the rejection of dependent claim 6 under 35 U.S.C. § 103 as being unpatentable over Heyn, Sussman, and Burns. *See* Appeal Br. 19. For the reasons discussed above, we sustain the Examiner’s rejection of claim 6.

Rejection III

The Appellant provides a separate heading but not a separate argument for the rejection of dependent claim 9 under 35 U.S.C. § 103 as being unpatentable over Heyn, Sussman, and Grieve. *See id.* at 20. For the reasons discussed above, we sustain the Examiner’s rejection of claim 9.

Rejection IV

The Examiner’s rejection of claim 10, includes a finding that Heyn’s serving tray has a planar upper side surface 32 with a non-skid stick-on liner 34 made of a vinyl material. Final Act. 4 (citing Heyn ¶ 32), 6. The Examiner finds that Heyn does not teach that non-skid stick-on liner 34 is made of rubber, as required by claim 10. *See id.* at 6.

To remedy this deficiency, the Examiner relies on Gassick’s teaching of a serving tray with “rubber anti-skid material 115.” *Id.* (citing Gassick, col. 10, ll. 35–50, Fig. 4). Indeed, Gassick teaches the use of a neoprene rubber polymer film as an anti-skid material, which is adhered to tray platform 104. Gassick, col. 10, ll. 35–50, Fig. 4. The Examiner determines:

It would have been obvious to one of ordinary skill in the art . . . to substitute vinyl nonslip material [of Heyn] with rubber nonslip material as taught by Gassick [A] since the simple substitution of one known serving tray nonslip material for another is within the level of one of ordinary skill in the art and would yield the expected result of providing a nonslip surface on the serving tray and [B] further since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416; *see also Ballas Liquidating Co. v. Allied Indus. of Kansas, Inc.* (DC Kans) 205 USPQ 331.

Final Act. 6. The foregoing determination includes a specific reason (i.e., “A”) for modifying Heyn’s non-skid stick-on liner 34 made of a vinyl material in view of Gassick’s teaching of rubber anti-skid material 115, namely, a simple substitution of one known element for another to obtain predictable results. *Id.*; *see* Ans. 7. The Examiner includes further supporting rationale (i.e., “B”) for reason “A” by citing to case law. However, we do not need to look any further than reason “A,” *supra*, as providing adequate reasoning with rational underpinning for the Examiner’s rejection.

With regard to reason “A”, the Appellant argues that “the Examiner has taken facts beyond the record.” Appeal Br. 22; *see id.* at 23–25. The Appellant’s argument is not persuasive of Examiner error. The Examiner has taken into account the factual inquiries set forth in *Graham v. John*

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Deere Co.; namely, resolving the level of ordinary skill in the pertinent art. *See* MPEP § 2141(II); *KSR*, 550 U.S. at 421; *Sovish*, 769 F.2d at 743; *Jacoby*, 309 F.2d at 516. We have considered the remaining arguments advanced by the Appellant in the Appeal Brief at pages 23–25 and have determined that they are not persuasive of Examiner error.

Thus, we sustain the Examiner’s rejection of claim 10.

DECISION

We AFFIRM the Examiner’s decision rejecting claims 1–3 and 5–11.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED